IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-1723

JOHN L. HILL, Attorney General of Texas,
Appellant,

v.

MICHAEL L. STONE, ET AL.,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS

BRIEF FOR AMICUS CURIAE

MARSHALL BOYKIN III
Attorney for Amicus Curiae

William O. Harrison, Jr.,
Adam Basaldua, Jr.,
Mrs. Jimmie H. King and
Richard Bonner

2000 Bank and Trust Tower
B & T 249
Corpus Christi, Texas 78477

December 1974

FIDELITY PRINTING COMPANY, HOUSTON

INDEX

TABLE OF AUTHORITIES

Cases

IN THE

Supreme Court of the United States

No. 73-1723

JOHN L. HILL, Attorney General of Texas,

Appellant,

v.

MICHAEL L. STONE, ET AL.,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS

BRIEF OF WILLIAM O. HARRISON, JR., ADAM BASALDUA, JR., MRS. JIMMIE H. KING, AND RICHARD BONNER AS AMICUS CURIAE

INTEREST OF THE AMICUS CURIAE

William O. Harrison, Jr., Adam Basaldua, Jr., Mrs. Jimmie H. King and Richard Bonner are Plaintiffs in a cause numbered 74-C-60 styled William O. Harrison, Jr., et al. v. The City of Corpus Christi, et al. presently pending before the United States District Court for the Southern District of Texas, Corpus Christi Division. Such cause is, in all respects, similar to the case at bar. In the case at bar the Fort Worth election was held on April 11, 1972 submitting to the public a bond issue for library bonds. Such bonds were not approved by a majority of owners

rendering property for taxation but were approved by a majority of all voters. In the case pending in the United States District Court for the Southern District of Texas, Corpus Christi Division, the Corpus Christi election was held on December 9, 1972 submitting to the voting public a proposed bond issue for convention center bonds. Like the Fort Worth election, the bonds were not approved by a majority of the voters classified as owners of property rendered for taxation, but were approved by a majority of all voters.

This brief is filed with written consent of all parties to the case at bar.

This brief is filed in support of the position of Appellees and in support of the conclusion reached by the three-judge trial court except insofar as that court limited its opinion to apply prospectively only. This brief is also offered urging this Court to modify the judgment in the instant case to give it application to all Texas cases arising in which the dual-box election procedure was followed.

ARGUMENT

A. The Decision of the District Court that the Texas Laws in Question Violate the U. S. Constitution's Equal Protection Clause Should be Affirmed.

State voting laws resulting in invidious discrimination do not afford equal protection of the laws. *Reynolds* v. *Sims,* 377 U.S. 533, 12 L.Ed.2d 506, 84 S.Ct. 1362 (1964); *Avery* v. *Midland County,* 390 U.S. 474, 20 L.Ed.2d 45, 88 S.Ct. 1114 (1968); *Williams* v. *Rhodes,* 393 U.S. 23, 21 L.Ed.2d 24, 89 S.Ct. 5(1968); *Hadley* v. *Junior College District,* 397 U.S. 50, 25 L.Ed.2d 45, 90 S.Ct. 791 (1970); *Kramer* v. *Union Free School District,* 395 U.S. 621, 23 L.Ed.2d 583, 89 S.Ct. 1886 (1969); *Cipriano* v. *Houma,* 395 U.S. 701, 23 L.Ed.2d 647, 89 S.Ct. 1897 (1969); *Phoenix* v. *Kolodziejski,* 399 U.S. 204, 26 L.Ed.2d 523, 90 S.Ct. 1990; *Salyer Land Company* v. *Tulare Lake Basin Storage Dis-*

trict, 410 U.S. 719, 35 L.Ed.2d 659, 93 S.Ct. 1224 (1973). The paramount question in this case is what constitutes invidious discrimination.

Excluding those grounds which rationally protect the intelligent exercise of the voting franchise, almost any limitation upon or denial of the voting franchise is invidiously discriminatory, even when authorized by a non-discriminatory majority decision of the voters, if it relegates to a minority status in the democratic decision making process any citizen or group of citizens having a historically recognizable substantial interest therein. *Reynolds* v. *Sims*, supra; *Avery* v. *Midland County*, supra; *Kramer* v. *Union Free School District*, supra; *Cipriano* v. *Houma*, supra; *Phoenix* v. *Kolodziejski*, supra. But if no such substantial interest exists, neither does invidious discrimination. *Salyer Land Company* v. *Tulare Lake Basin Storage District*, supra.

Residence and length thereof, age, competence and similar qualifications are related to the ability to participate intelligently in the electoral process. *Lassiter* v. *Northampton County Board of Elections*, 360 U.S. 45, 3 L.Ed.2d 1072, 79 S.Ct. 985; *Carrington* v. *Rash*, 380 U.S. 89, 85 S.Ct. 775; *Dunn* v. *Blumstein*, 405 U.S. 330, 31 L.Ed.2d 274, 92 S.Ct. 995. Wealth, like race, creed or color is not germane to one's ability to participate intelligently. *Harper* v. *Virginia Board of Elections*, 383 U.S. 663, 16 L.Ed.2d 169, 86 S.Ct. 1079 (1966). Neither is ownership or non-ownership of property germane to one's ability to participate intelligently. *Kramer* v. *Union Free School District*, supra; *Phoenix* v. *Kolodziejski*, supra. Rendition of such property should be even less germane to one's ability to participate intelligently.

If a state is to otherwise limit, restrict or deny the vote of any citizen or group of citizens in any matter in which

such citizen has a historically recognizable interest, it may only be for reasons of compelling State interest. *Kramer* v. *Union Free School District*, supra; *Phoenix* v. *Kolodziejski*, supra. Or, recognizing the test advocated by some of the justices of this Court, by reason of a purpose rationally related to a permissible legislative end. See dissenting opinion of Justice Stewart joined in by Justices Black and Harlan in *Kramer* v. *Union Free School District*, supra.

In each case in which there is some restriction upon or denial of the voting franchise upon grounds other than those rationally protecting the intelligent exercise of such franchise the first question becomes whether such denial of or limitation upon the right to vote affects a citizen or citizens having a historically recognizable substantial interest therein. *Kramer* v. *Union Free School District*, supra; *Phoenix* v. *Kolodziejski*, supra; *Salyer Land Company* v. *Tulare Lake Basin Storage District*, supra. Because of our historical tradition, at least since the time of the Fourteenth Amendment, of unrestricted franchise upon a one person to one vote basis it would seem that the burden would be upon those claiming that the state laws relating to voting did not result in invidious discrimination against a particular citizen or group of citizens to show that such citizen or group of citizens did not have a historically recognizable interest in the particular democratic decision making process in question.

Salyer Land Company v. *Tulare Lake Basin Water Storage District*, supra, seems to be a case in which such a burden was met. In *Tulare*, a special type of water district in which, at least by majority view, both the burdens (taxation) and the benefits (water use) were shared only by the owners of land in the district and then proportionately, and in which voting was limited to such owners, and then proportionately to tax base, was not invidious discrimina-

tion as it did not relegate to a minority status in the particular democratic decision making process any citizen or group of citizens having a historically recognized substantial interest therein. Put another way, in that case the parties complaining of being denied a right to vote in the water storage district elections had no recognizable interest therein as they neither shared in the burdens nor the benefits resulting therefrom. A similar analysis would apply to *Associated Enterprises, Inc.* v. *Toltec Watershed Improvement District*, 410 U.S. 743, 35 L.Ed.2d 675, 93 S.Ct. 1237 (1973).

The interest of one group of citizens to the exclusion of another and the fair distribution of votes based on benefits and burdens is not so easily recognized in other situations; and in most situations, other than special purpose districts as existed in *Tulare* and *Toltec*, the historical tradition of equality, proven in practice as superior to any other system in protecting the democratic process, is one person-one vote. *Reynolds* v. *Sims*, supra.

The case at bar most nearly resembles the case before the court in *Phoenix*. The major differences are that in the case at bar: (1) questionability of the Texas laws had been recognized by the Attorney General and a dual system of voting installed in recognition thereof; (2) the complaining citizens object to the defeat of the bond election whereas in *Phoenix* the complaint was with regard to passage of the bond issues; (3) the Texas law restricts voting in bond issues to rendering owners of any property not specifically exempted by statute whereas in *Phoenix* voting was restricted to real property owners; and (4) the principal and interest on the bonds would be repaid solely from revenues from property taxes whereas in *Phoenix* property taxes were to be levied to service such indebtedness but

the city was legally privileged to use other revenues in payment of the bonds.

There are other peculiarities in Texas law which are relevant to the issue of discrimination. There is a possibility not only of self-discrimination by reason of the citizen failing to render his property (whether the result of ignorance, negligence, or a reluctance to pay taxes, particularly on personalty) but of discrimination by the tax-assessor and collector in the exercise and non-exercise of such official's power to search out and place upon the tax rolls any properties subject to taxation. See *Montgomery Independent School District* v. *Martin*, 464 S.W.2d 638 (Tex. 1971).

The Attorney General argues that "[t]he very nature of a general obligation bond and the universality of property subject to taxation in Texas combine to lend constitutional validity to the property rendering requirements...." and that the Texas laws while disenfranchising no one "limits the vote to those who are 'primarily interested' in the outcome of ..." a bond election. The components of the argument are contradictory.

The mere fact that the citizen makes the choice will not rescue from such laws being classified as invidious discrimination. *Harper* v. *Virginia State Board of Elections*, supra. But, even so, in the case of the Texas laws the very purpose can be defeated at least in part if not in whole by the action of the tax-assessor and collector, if, indeed, the purpose could be considered worthwhile when the rendition of one single property of smallest value would suffice.

The State argues that the Texas laws limit the vote to those who are "primarily interested" in the outcome of an election and by reason thereof does not fail to afford the

equal protection of the laws. Primary interest does not rest exclusively in those bearing the burden of ad valorem taxation, if it can truly be said that the burdens would only be imposed upon the rendering taxpayers. (The fact that principal and interest of the bonds may only be paid from such revenues means that other citizens will bear a burden by increase in sales taxes, utility revenues, and the like, to support other city services otherwise paid by such ad valorem taxes as well as increased rents and other cost of goods and services by reason thereof.) Users of the facilities to be built as a result of the bond issue, that is, beneficiaries thereof, have as much "primary interest," that is, recognizable substantial interest, in such an election.

That all citizens, be they property owners or non-property owners, have a substantial interest in public libraries has been recognized by a prior opinion of this Court. *Avery* v. *Midland County*, supra, at page 53. Likewise, it would seem all citizens have such an interest in convention centers and similar public facilities.

Restriction upon or denial of voting rights to any part of that public must therefore rest upon some other recognizable state interest whether it be tested by the "compelling state interest" test or by determination of a purpose rationally related to a permissible legislative (or state constitutionally authorized) end.

The State has urged as such interest or purpose forcing the non-renderer of property to render such property for taxation. But such purpose is at best a myth since any citizen may make a mere token rendition and secure voting privileges.

Further, the Texas laws in question are not rationally related to accomplishment of such purpose not only by

reason of token rendition being sufficient but also because the act of the tax-assessor and collector may relieve the non-renderer from any affirmative act.

Tested by all standards the Texas laws limiting bond issue elections to owners of property rendering property for taxation relegates to a minority status in the democratic decision making process a group of citizens having a historically recognizable substantial interest in such elections without justification by reason of compelling state interest or, alternatively, by reason of a purpose rationally related to a permissible legislative (or state constitutionally authorized) end.

Comparison with *Phoenix* demonstrates no distinction of such merit as to justify not following the rule of stare decisis.

B. The Decision of the District Court Should Apply to all Texas Cases Arising After the City of Fort Worth Election in Which the Dual-Box Election Procedure was Followed.

The District Court in its opinion noted that "many communities have relied on the Texas law and have approved or disapproved bonds in elections that *excluded the votes of citizens not rendering property for taxation.*" (emphasis supplied) The District Court ordered prospective relief only.

As this Court observed in *Great Northern R. Co.* v. *Sunburst Oil & Refining Co.*, 287 U.S. 358 (1932), ancient dogma suggests that all court decisions are to have a retroactive effect. Such question is not one of constitutional dimension. *Great Northern R. Co.* v. *Sunburst Oil & Refining Co.*, supra. In stewarding the Federal law and the U.S. Constitution, the Federal courts have reserved unto themselves the discretionary lattitude to avoid giving full retro-

active effect to judgments where the goal is "avoiding the 'injustice or hardship' by a holding of non-retroactivity." *Cipriano* v. *City of Houma*, 395 U.S. 701 (1969).

Bond elections held in the Texas cities of Fort Worth and Corpus Christi were held after this Court's rulings in *Cipriano* and *Phoenix*. Both cities recognized that the Texas law was subject to the same attacks made in Arizona and Louisiana. Accordingly, both cities held elections which could be effected under both extant Texas law and the law as may soon be announced by this Court. Given a retroactive application of the Fort Worth decision, neither city will have suffered for reliance upon the Texas statute. Neither will any other Texas municipality which has held a dual-box election as in the case of Fort Worth and Corpus Christi if such retroactive effect is limited to such elections as it should be. To the contrary, Fort Worth and Corpus Christi have held elections in reliance upon their belief that should their dilemma become real, such dilemma would be resolved by the Courts. Each city has sought to avoid the uncertainty occasioned by holding a potentially void election and each has sought to obviate the expense of monies and time which a second election would necessitate. Making the decision in this case retroactive as to all dual-box elections could spare the State and its municipal subdivision as well as the Courts multiplicity of suits.

One other limitation to avoid the possibility of undue hardship upon such retroactive effect should be that the decision would be prospective only as to any election in which property owners rendering property for taxation approved the issue and the total vote disapproved the issue in the unlikely event that the Attorney General may have approved issuance of bonds in such a case and which bonds may have been sold or be in the process of being sold. Otherwise, no harm can result from sale of bonds or from prohibiting the sale thereof as the result of any dual-box election, and substantial waste of time, money and courts'

time can result from a judgment applying only to elections occurring subsequent to its announcement.

CONCLUSION

For the reasons stated the decision of the three-judge district court that the Texas laws in question violate the U. S. Constitution's equal protection clause should be affirmed; however, the judgment of that court should be modified to make it applicable to other Texas cases such as the Corpus Christi case in which the dual-box election procedure was followed.

Respectfully submitted,

Marshall Boykin III,

Attorney for the named Amicus Curiae

2000 Bank & Trust Tower
B & T 249
Corpus Christi, Texas 78477

CERTIFICATE OF SERVICE

I, Marshall Boykin III, as of counsel for Amicus Curiae herein named and member of the Bar of the Supreme Court, hereby certify that true and correct copies of the above foregoing Amicus Curiae Brief have been served upon the several parties thereto, in compliance with Rule 33(1) of the United States Supreme Court Rules, by placing three copies in the mail, first class postage prepaid, to S. G. Johndroe, Jr., City Attorney and Attorney for Appellees R. M. Stovall, S. G. Johndroe, Jr., Roy A. Bateman, Leonard E. Briscoe, Taylor Gandy, Jess M. Johnston, Jr., W. S.

Kemble, Jr., John O'Neill, Ted C. Peters, Pat Reece, Mrs. Margaret Rimmer, and the City of Fort Worth, at 1000 Throckmorton Street, Fort Worth, Texas 76102; and by placing three copies in the mail, first class postage prepaid, to Don Gladden and Marvin Collins, Attorneys for Appellees, at 702 Burk Burnett Building, Fort Worth, Texas 76102; and by placing three copies in the mail, first class postage prepaid, to John L. Hill, Attorney General of Texas, Larry F. York, First Assistant Attorney General, Mike Willatt, Assistant Attorney General, and G. Charles Kobdish, Assistant Attorney General, Attorneys for Appellant, State of Texas, at Box 12548, Capitol Station, Austin, Texas 78711. I further certify that I also placed three copies in the mail, first class postage prepaid to James R. Riggs, City Attorney of Corpus Christi, Texas, and James F. McKibben, Jr., Assistant City Attorney of Corpus Christi, Texas at P. O. Box 9277, Corpus Christi, Texas 78408. All parties required to be served have been served.

Witness my hand this 20 day of December, 1974.

Marshall Boykin III

2000 Bank & Trust Tower
B & T 249
Corpus Christi, Texas 78477